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In The

Supreme Court of the United States

October Term, 1996

FRANCIS BERNARD AUER, *et al.*,

Petitioners,

v.

DAVID A. ROBBINS, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, THE FLORIDA LEAGUE OF CITIES, THE IOWA LEAGUE OF CITIES, THE INSTITUTE FOR LOCAL GOVERNMENT LAW; THE GEORGIA MUNICIPAL ASSOCIATION; THE CITY AND COUNTY OF SAN FRANCISCO; CALIFORNIA CITIES OF LOS ANGELES; SAN JOSE; AND SAN BUENAVENTURA; CALIFORNIA COUNTIES OF BUTTE AND SANTA CLARA; CITY OF PORTLAND, OREGON; GEORGIA CITIES OF GRIFFIN; SAVANNAH; AND WARNER ROBBINS; AND CITY OF CHICAGO, ILLINOIS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE AN AMICUS BRIEF

Amici curiae move for leave to file the attached amicus curiae brief. Sup. Ct. R. 37.3. Respondents have consented to the filing of this brief. However, petitioners have granted only limited consent – expressly refusing to consent to amici raising the issue of whether the 10th amendment precludes application of the salary basis test to public employers. *See* Appendix C, Ltr. from Michael Leibig, October 9, 1996. Amici assert the existing salary basis test cannot validly be applied to public employers consistent with the Administrative Procedure Act (APA) and Tenth Amendment.

The issues raised in the attached brief are within the ambit of the questions posed to this Court: whether the salary basis test applies to public employees. Moreover, if the issues raised by amici are not addressed, amici believe that the flood of litigation triggered by the Department of Labor's failure to adjust the salary basis test to the fundamentals of public employment will continue unabated.

Amici curiae participating in this brief are the League of California Cities; the Florida League of Cities; the Iowa League of Cities; the Institute for Local Government Law; the Georgia Municipal Association; the City and County of San Francisco; California Cities of Los Angeles; San Jose; and San Buenaventura; California Counties of Butte and Santa Clara; City of Portland, Oregon; Georgia Cities of Griffin; Savannah; and Warner Robbins; and City of Chicago, Illinois.

The state leagues participating in this brief represent hundreds of municipalities, many of which face significant unfunded backpay liabilities as a result of the Department of Labor's salary basis test.

Two amici curiae, the cities of Los Angeles, California, and Portland, Oregon, are involved in Fair Labor Standards Act (FLSA) litigation pending in the United States Court of Appeals for the Ninth Circuit. In both cases, the Ninth Circuit has deferred final resolution of whether the salary basis test validly applies in the public sector pending the Court's resolution of this case. In *McGuire v. City of Portland*, 91 F.3d 1293 (9th Cir. 1996), the Ninth Circuit recently issued an Order regarding the City's petition for rehearing. The Order states: "Consideration of the petition for rehearing and suggestion for rehearing *en banc* is deferred pending the Supreme Court's decision in *Auer v. Robbins*." The Ninth Circuit issued a similar order in *Block v. City of Los Angeles*, et al., U.S. Court of Appeals for the Ninth Circuit, Nos. 94-56135, 94-56421, 94-55345. These orders are reproduced at Appendix A.

Resolution of whether the salary basis test validly may be applied to public employers is essential to amici and virtually all other local and state public employers. The Court should not issue an opinion determining the meaning and effect of the salary basis test without first reaching the critical issue whether the test is validly applied to the public sector. Amici believe this brief will assist the Court in ruling on the present case and resolving fully a longstanding issue which has divided the federal courts.

Counsel for amici have participated in salary basis test litigation in three federal circuits, including: *Stewart v. City and County of San Francisco*, 834 F.Supp. 1233 (N.D. Cal. 1993), *aff'd*, 69 F.3d 545 (9th Cir. 1995); *Service Employees Int'l Union Local 102 v. County of San Diego*; 60 F.3d 1346 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 774 (1996); *Yourman v. Dinkins*, 84 F.3d 655 (2nd Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3110 (Jul. 29, 1996) (No. 96-152); *McGuire v. City of Portland*, 91 F.3d 1293 (9th Cir. 1996); and *Jackson v. Commonwealth of Ky;* 892 F.Supp. 923 (E.D. Ky. 1995), *appeal pending*, Nos. 95-6283, 95-6284 (6th Cir. 1996).

Amici respectfully request this Court to grant leave to file the attached Amici Curiae Brief in support of respondents.

DATED: October 11, 1996 Respectfully submitted,

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I. INTRODUCTION

This is a case of a federal agency's regulatory authority run amuck. By deliberate indifference, the United States Department of Labor ("DOL") has allowed its salary basis test to generate hundreds of lawsuits, and potentially, billions of dollars in liability to state and local taxpayers. Yet applying the salary basis test to state and local governments contradicts Congressional intent, violates the most minimal requirements of federal rulemaking, and denies local governments the basic process mandated by the Court in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). This Court should say so.

The need for such a statement is clear. While many lower courts now agree that the salary basis test was invalid as applied to public employers before its modification in 1992, the issue of the test's validity after 1992 remains a source of disagreement among federal courts. In particular, the Ninth Circuit has deferred resolution of the validity of the test after 1992 pending a ruling in this case.[1] The Court should end the controversy by holding that in light of the DOL's incomprehensible lack of action, application of the test to state and local governments violates the Administrative Procedure Act and the Tenth Amendment of the United States Constitution.

II. SUMMARY OF ARGUMENT

Since its enactment in 1938, Congress has exempted executive, professional and administrative ("white collar") employees from the Fair Labor Standards Act's

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[1] *McGuire v. City of Portland*, 91 F.3d 1293 (9th Cir. 1996); petition for rehearing. *Block v. City of Los Angeles*, et al., U.S. Court of Appeals, Ninth Circuit, Nos. 94-56135, 94-56421, 94-55345. See Appendix A.

(FLSA's) overtime provisions. In 1954, based on evidentiary hearings involving only private sector employers, DOL issued the salary basis regulation, 29 C.F.R. section 541.118. The regulations were based upon evidence that "salaried" status was a nearly universal indicator of white collar employment in the private sector.

When Congress amended the FLSA in 1974 to apply to public employees, Congress intended that the white collar exemptions apply in the public sector.

In 1985, the Court ruled in *Garcia*, 469 U.S. 528, that the FLSA validly applied to state and local public employers. DOL soon recognized that the salary basis test, created to exempt white collar employees in the private sector from the FLSA, did not exempt these same employees in the public sector.[2]

It was not until 1991 and 1992, however, that DOL finally acted on this knowledge. Faced with conflicting court rulings and huge taxpayer liabilities, DOL eliminated a central feature of the salary basis test: the "partial day docking" provision. In doing so, DOL admitted: "The regulations were . . . out of harmony with the intent of the [FLSA] because State and local governments could not practically avail themselves of the exemptions intended by Congress, and thus were *inappropriate* as applied to the public sector." 57 Fed. Reg. 37666, 37672 (Aug. 19, 1992) (emphasis added).

Inexplicably, however, in 1991 and 1992 DOL refused to consider (1) whether the salary basis test as a whole is a

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[2] Unlike their private sector counterparts, public employers were subject to rules of public accountability, as well as to civil service rules and due process constraints unique to public employment. As a result, public sector employers routinely required employees *at all levels* to account for their time, and deducted from all employees' pay for time not worked.

valid indicator of white collar status in the public sector; and (2) whether any of the remaining, ancillary aspects of the test were valid indicia of white collar status in the public sector. DOL concluded only that these aspects of the salary basis test were not "open for comment" and would be considered at a later date. DOL also refused – as it has to this day – to consider whether the salary basis test appropriately applies to the public sector *at all*.

Since 1992, DOL has recognized continuing problems with the operation of the salary basis test generally, and its disciplinary restriction in particular. In more than half a dozen published regulatory agenda, DOL has lamented its "progressive loss of control" over interpretation of the salary basis test and promised action.

Despite its promises of change, for more than a decade DOL has left in place a salary basis test that bears little if any relation to the manner in which public employers distinguish between white collar and other employees. Significantly, for this reason, *the federal government has chosen not to apply the salary basis test to its own operations.*[3]

Administrative agencies have a duty to address and refine their regulations on an ongoing basis. The extension of the FLSA to millions of public employees was plainly an event of sufficient magnitude to trigger DOL's duty to examine whether the salary basis test appropriately distinguished white collar employees in the public sector. DOL had even greater reason to act because the agency admits

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[3] *See* 5 C.F.R. §§ 551.101-551; *McGuire v. City of Portland*, 91 F.3d 1293, 1296 (9th Cir. 1996) (Skopil, J., concurring) ("[T]he federal government, notwithstanding the FLSA, has elected not to apply the salary standards, including the disciplinary provisions, to federal employees."); *Kinney v. District of Columbia*, 994 F.2d 6, 12 (D.C. Cir. 1993) (regulations applying FLSA to federal government "contain no salary basis test."); 57 Fed. Reg. at 37667.

it was aware that the salary basis test did not function properly in the public sector and contradicted Congressional intent.

In short, application of the salary basis test to public employers violates the APA because: (1) the test contravenes Congressional intent; (2) DOL has never articulated a rationale for applying the salary basis test to the public sector; (3) DOL failed in 1992 to address important aspects of the problem with the salary basis test; (4) the salary basis test operates irrationally as applied to public employers; and (5) DOL has unreasonably failed to address the salary test's recognized infirmities in a timely manner.

DOL's duty to state a rationale for the salary basis test is heightened by the Court's Tenth Amendment precedents. At a minimum, federalist principles require DOL to articulate a solid reason, founded on clear Congressional intent, for requiring local and state governments to conform to federal regulation of matters traditionally within local government's control.[4] Control of employment practices in local government is indisputably such a matter.

Further, under *Garcia* and *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the salary basis test, an administrative action which significantly intrudes on local governance, cannot validly be applied to state and local governments absent Congressional ratification. And even if the Court were to

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[4] The issue is not whether local and state public employers *can* alter their disciplinary systems to eliminate suspensions of one to five days for FLSA exempt employees. Rather, the issue is whether DOL has articulated a rationale solidly founded on the goals of the FLSA for requiring public employers to do so. *See Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 643 (1986) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("an agency's action must be upheld, if at all, on the basis articulated by the agency itself.")).

accord DOL's actions the same deference it has accorded Congressional actions under *Garcia*, DOL manifestly has failed to provide an adequate forum for local and state government to challenge the application of the salary basis test.

III. INTERESTS OF AMICI CURIAE

The interests of Amici are stated in the Motion for Leave to File this Amicus Curiae brief.

IV. THE HISTORY OF THE SALARY BASIS TEST'S APPLICATION TO STATE AND LOCAL GOVERNMENT

1. The Fair Labor Standards Act And Its Overtime Exemption For White Collar Employees

The FLSA was adopted in 1938. One of the Act's core provisions is a requirement that employers pay overtime compensation to employees working over a specified number of hours (usually 40) per workweek, unless the employees are exempt. 29 U.S.C. §§ 207 and 213.

When first enacted by Congress, the FLSA covered only private employers. *See* 29 U.S.C. § 202; *United States v. Darby*, 312 U.S. 100 (1941). In 1966, Congress extended the Act's coverage to certain government employees, particularly hospital workers and employees in some local transit operations. *See Maryland v. Wirtz*, 392 U.S. 183 (1968).

In the Fair Labor Standards Amendments of 1974, Congress attempted to extend coverage to all public employers. *See* 57 Fed. Reg. 37666, 37667 (Aug. 19, 1992). However, in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court ruled that extending the FLSA to state

and local government violated the Tenth Amendment. The Supreme Court reversed *National League of Cities* in *Garcia*, 469 U.S. 528 (1985). The Fair Labor Standards Amendments of 1985 made the Act applicable to state and local public entities on April 15, 1986. *See* Fair Labor Standards Amendments of 1985, Pub. Law No. 99-150, § 6.

Since its original enactment in 1938, Congress has exempted certain "white collar" employees from the FLSA's overtime requirements:

> The provisions of §§ 206 [wages] and 207 [hours] of this title *shall not apply* with respect to . . . any employee employed in a bona fide *executive, administrative, or professional* capacity . . . (*as such terms are defined and delimited from time to time by regulations of the Secretary*. . . .)

29 U.S.C. § 213(a)(1) (emphasis added).

Thus, while Congress mandated that white collar employees be exempt from overtime, Congress delegated to DOL the responsibility for defining and delimiting the exemptions. The FLSA itself makes no mention of a "salary basis test."

2. Department Of Labor Regulations

a. Origin Of The Salary Basis Test

In 1940, when the FLSA applied only to private employers, DOL established two categories of tests to determine whether employees qualify for the white collar exemption – the "duties" test, 29 C.F.R. §§ 541.1, 541.2 ("administrative" exemption); 541.3 ("professional" exemption), and the "salary basis test." *See* 29 C.F.R. § 541.1(f); 541.2(e)(1); 541.3(e); 541.118.

The current salary basis test – which has not changed significantly since 1954 – was developed after 22 days of hearings and evidence *gathered from private employers*. 57

Fed. Reg. at 37666. With certain exceptions, the test requires exempt employees to be paid a fixed amount for an entire workweek, "without regard to the number of days or hours worked."[5]

The principal rationale for the salary basis test was that exempt employees in the private sector were nearly universally paid on a salary basis. 57 Fed. Reg. at 37666. No public sector employers participated in the hearings which led to the development of the salary basis test because the FLSA did not apply to public employment at that time.

b. DOL's Response To The Supreme Court's Decision in *Garcia v. San Antonio Metropolitan Transit Authority*

After the Court's decision in *Garcia*, the FLSA was extended to state and local government. In the Fair Labor Standards Amendments of 1985, Congress attempted to address certain concerns unique to state and local employers, and postponed the effective date of the FLSA

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[5] The test provides:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed. Subject to [certain] exceptions . . . , the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

29 C.F.R. § 541.118(a).

to the public sector to April 15, 1986. Congress did *not* address the white collar exemptions or DOL's related (Part 541) regulations. *See* Fair Labor Standards Amendments of 1985.

Shortly after *Garcia*, DOL issued its 1985 Advanced Notice of Proposed Rulemaking (ANPR) regarding the 29 C.F.R. Part 541 ("white collar") regulations. DOL asked specifically: "Should the salary tests be eliminated?" 50 Fed. Reg. 47696 (Nov. 19, 1985) This ANPR represented the first opportunity for state and local government to comment on the white collar regulations.

After receiving public comments, DOL soon learned that because of public pay practices, the salary basis test effectively eliminated the white collar exemptions in the public sector. 57 Fed. Reg. at 37666, 37667. Yet DOL conducted no rulemaking. In fact, DOL has never conducted rulemaking pursuant to its 1985 ANPR.

In January 1987, DOL *promised* rulemaking, and in the meantime adopted "a non-enforcement policy . . . with regard to the salary basis of payment for otherwise exempt public employees." 57 Fed. Reg. at 37668. As one court concluded last year: "This nonenforcement policy is tantamount to an admission by DOL that the regulation in place, i.e., the salary basis test, was unsuitable as applied to public employees." *SEIU, Local 102 v. County of San Diego*, 60 F.3d 1346, 1357 (9th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3349 (Jan. 16, 1996).

Despite admitting that the salary basis test was unsuitable as applied to public employees, DOL authorized private litigation. "In effect, the DOL abdicated its central role in this evolving process and punted, sending the salary basis test and the overtime compensation issue to the courts." *Id.*

> Worse yet, the promised rulemaking did not immediately materialize. *Four years* passed with the nonenforcement policy in place and no definitive activity by the DOL to address this pressing problem. In the meanwhile, public employers and public employees found themselves in complex litigation trying to grapple with these pressing issues on which the DOL should have provided guidance, but did not.

Id. at 1357-58.

In the absence of rulemaking or definitive guidance from DOL, conflicting rulings regarding application of the salary basis test were issued in virtually every circuit in the United States. Judge Reinhardt of the Ninth Circuit Court of Appeals issued the seminal decision in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991), holding the county liable for its public accountability policy of authorizing pay only for time actually worked. Various courts adopted *Abshire's* holding, *see, e.g., Carpenter v. City and County of Denver*, 82 F.3d 353, 357 (10th Cir. 1996); *Michigan Association of Governmental Employees v. Michigan Dep't of Corrections*, 992 F.2d 82 (6th Cir. 1993), others limited the holding to instances where there had been actual, as opposed to merely theoretical, deductions in pay. *See, e.g., McDonnell v. City of Omaha*, 999 F.2d 293, 297 (8th Cir. 1993); *Atlanta Professional Firefighters Union v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991).

c. DOL's 1991-1992 Rulemaking

More than five years after the FLSA was extended to state and local government, DOL finally addressed the salary basis test through rulemaking. In September 1991, DOL issued an Interim Final Rule (IFR), in recognition that the salary basis test "could well result in enormous, unforeseen liability of [state and local] governments and may threaten their fiscal integrity." 56 Fed. Reg. 45824, 45825 (Sep. 6, 1991). The IFR authorized deductions from

salary and leave balances, thereby eliminating the effect of *Abshire*. In August 1992, DOL published its Final Rule, which is nearly identical to the IFR. *Compare* 29 C.F.R. § 541.5d, 57 Fed. Reg. at 37677 *with* the IFR, 56 Fed. Reg. at 45826.

In the Final Rule, DOL admitted: (1) the salary basis test was never intended to apply to public employers; (2) applying the salary basis test to public employers would "inappropriately deprive" public employers of the white collar exemptions; and (3) the salary basis regulations were "out of harmony with the intent of the [FLSA]." *Id.* at 37672.

Despite these admissions, DOL corrected only the aspect of the salary basis test identified by *Abshire*. DOL refused on procedural grounds to reconsider the key aspect of the salary basis test at issue in this litigation – its restriction on disciplinary suspensions. *See* 57 Fed. Reg. at 37674 (the issue "was not open for comment.") DOL also decided that sufficient justification had not been shown to eliminate the salary basis test. As a result, DOL created a self-contradictory rule: exempt employees must be paid "on a salary basis," but deductions for absences are permitted. *See* 29 C.F.R. § 541.5d. Significantly, nowhere in the 1992 regulation or commentary did DOL articulate any rationale for applying the salary basis test in the public sector.

d. DOL's Continuing Failure To Act On Its 1985 Advance Notice of Proposed Rulemaking

Since its 1992 rulemaking, DOL has continued to promise rulemaking pursuant to its 1985 ANPR. Despite repeated promises, and a request by the Office of the President, DOL has never considered whether the salary

basis test appropriately applies to the public sector; articulated any rationale for application of the test to the public sector; or carried out its rulemaking first proposed over ten years ago.

In April 1993, DOL published a notice stating its intention to carry out rulemaking by September 1993 concerning the white collar exemptions. 58 Fed. Reg. 24569 (Apr. 1993). The year passed without action by DOL.

In April 1994, on behalf of the President of the United States, Leon Panetta asked the Secretary of Labor to "undertake a comprehensive review and revision of the FLSA overtime regulations, as they apply to the public sector, to make them workable in today's economy." (Appendix B, Ltr. from Panetta to Reich, dated April 14, 1994.)[6] DOL, however, never responded.

In November 1994, DOL issued a regulatory agenda blaming "recent court rulings" for the confusion regarding its salary basis and other "white collar" regulations, and admitting that a "comprehensive review of [the white collar] regulations is both necessary and appropriate." DOL again promised rulemaking. 59 Fed. Reg. 57127, 57129 (Nov. 14, 1994).

In May and November 1995, DOL issued almost identical agenda. 60 Fed. Reg. 23543, 23544 (May 8, 1995); 60 Fed. Reg. 59608 (Nov. 28, 1995). Despite recognizing

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[6] Amici respectfully request the Court to take judicial notice of this letter. *See* Fed. Rules Ev., Rule 201(f); *United States v. Camp*, 723 F.2d 741 (9th Cir. 1984.) The letter from Mr. Panetta also states: "[D]ue to the outdated nature of the section 541 regulations, some highly compensated public sector employees with responsibilities that would normally exempt them from coverage may be eligible for overtime, a situation that could cost State and local governments hundreds of millions of dollars." (*Id.*)

that its regulations were out of date, DOL again blamed the courts for inconsistent rulings. "[R]ecent court rulings have caused confusion as to what constitutes compliance with the regulations 'salary basis' criteria in both the public and private sectors." DOL added:

> Legal developments in court cases are causing *progressive loss of control* of the guiding interpretations under this exemption and are creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices. These court rulings are creating apprehension in both the private and public sectors. Clear, comprehensive, and up-to-date regulations would provide for central, uniform control over the application of these regulations and ameliorate this apprehension. 60 Fed. Reg. at 59613-14.

Most recently, on May 13, 1996, DOL yet again noted that its 1992 rulemaking was "limited," its regulations were therefore "still in need of updating and clarification," and that the agency continued to experience a "progressive loss of control over the regulations." 61 Fed. Reg. 23238 (May 13, 1996).

V. ARGUMENT

A. AS APPLIED TO STATE AND LOCAL GOVERNMENT, THE SALARY BASIS TEST VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act (APA), 5 U.S.C. § 701, *et seq.*, imposes substantive and procedural limitations on rulemaking carried out by administrative agencies such as DOL. Under the APA, courts must set aside agency rules that (1) conflict with or frustrate Congressional intent; (2) are arbitrary, capricious, an abuse or discretion, or otherwise not in accordance with law; or

(3) are unconstitutional. *See* 5 U.S.C. § 706; *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984).[7]

This case raises fundamental questions about DOL's rulemaking responsibilities under the FLSA. There are two time periods which frame the APA analysis. The first period is from April 15, 1986 (the date the FLSA was first extended to the state and local government), until September 6, 1991 (the date DOL finally conducted limited rulemaking on one aspect of the salary basis test). The second period is from September 6, 1991 through the present.

DOL has failed to meet its minimum responsibilities under the APA during both of these periods. Remarkably, to this date, DOL continues to abdicate its duty to address how or even whether the salary basis test should apply in the public sector. In addition, the agency *expressly refuses* to articulate any rationale for forcing public entities to alter their personnel and disciplinary systems in order to meet the terms of the regulations. Amici believe that DOL has acted in direct contravention of its responsibilities as outlined by the Court in its previous APA decisions.

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[7] Amici agree with the Wisconsin Attorney General that the salary basis test is an interpretive, rather than a substantive, regulation. Thus, under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), whether courts defer to DOL's salary basis interpretations depends upon their internal consistency, logic and persuasive power. Here, amici apply the Court's *Chevron* APA standards, and demonstrate that the salary basis test cannot pass muster even under this more deferential standard.

1. The Court Should Confirm That The Salary Basis Test Was Invalid In Its Entirety Prior to September 1991

The most elemental principle of administrative rulemaking is that an agency cannot promulgate regulations implementing a statute it administers which eviscerate the statute. Any rule or regulation that cannot be harmonized with its authorizing Congressional act is a nullity. *Dixon v. United States*, 381 U.S. 68, 74 (1965).

> [T]he courts are the final authorities on issues of statutory construction and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.

Securities Exchange Comm'n v. Sloan, 436 U.S. 103, 118 (1978) (citations omitted).

When reviewing an agency's construction of a statute, courts must first ascertain whether Congress expressed its intent on the issue. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). A court must give effect to the unambiguously expressed intent of Congress. *Fort Stewart Schools v. Federal Labor Relations Auth.*, 495 U.S. 641, 645 (1990).

Here, Congress has stated plainly that the FLSA's overtime provisions "shall not apply" to executive, administrative and professional employees. 29 U.S.C. § 213(a). Congress has directed DOL to "define and delimit" the white collar exemptions on an ongoing basis. *Id.; see also Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 617 (1944) (the exemptions are "part of a legislative code subject to continuous revision with the changing course of events.") Most importantly, Congress clearly

has indicated its intention that the white collar exemptions apply to state and local government.[8]

Despite these Congressional mandates, DOL failed to redefine the salary basis test after the FLSA was extended to state and local government. Significantly, *DOL itself admits that the salary basis test was contrary to Congressional intent*, at least until its 1991 rulemaking. *See* 57 Fed. Reg. at 37672.

Given this critical admission, many courts have concluded without difficulty that until September 1991 the salary basis test was invalid as applied in the public

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[8] The House Committee report accompanying the bill that became the 1974 FLSA amendments stated:

> Section 6 of the bill extends minimum wage and overtime coverage to about 5 million *non-supervisory* employees in the public sector not . . . covered by the Act. . . . The bill will provide that virtually all *non-supervisory* government employees will be covered. . . . By the same token, the committee intends to cover all employees (*except professional, executive, and administrative personnel who are exempted under section 13 of the law*) in all civilian branches of the Federal Government.

H.R. Rept. No. 93-313, 93rd Cong., 2nd Sess. p. 27 (1974) (emphasis added). *See also* S. Rept. No. 93-690, 93rd Cong., 2d Sess., p. 13 (Feb. 22, 1974) (emphasis added); S. Rept. No. 93-300, 93rd Cong., 1st Sess., pp. 15, 25 (1973).

Senate testimony reiterated this intent. Senator Dominick, who introduced an early version of the Senate bill, stated in testimony:

> [T]his bill would extend minimum wage coverage to some 4.7 million Federal, State, and local government employees not now covered by the Fair Labor Standards Act. *Coverage would not be extended to . . . professional, executive, and administrative personnel. . . .*

Floor Debate on S.1725, Congressional Record (May 7, 1973).

sector. *See, e.g., SEIU*, 60 F.3d 1346; *Balgowan v. State of N.J., Dept. of Transp.*, 84 F.3d 656 (3rd Cir. 1996), *reh'g granted*, Op. and J. *vacated* (1996); *Jackson v. Com. of Ky.*, 892 F.Supp. 923, 929 (E.D.Ky. 1995), *appeal pending*, Nos. 95-6283, 95-6284 (6th Cir. 1996).

Here, the Court should address this issue because the plaintiffs seek to apply the test before it was amended by DOL. The Court should conclude that the test violates the APA because, by DOL's admission, the test conflicted with Congressional intent.

Petitioners assert that Congress has impliedly ratified the salary basis test by passing legislation that mentions the test, and by failing to pass legislation aimed at eliminating the test. (Pet. Br., 26-28.) Whether courts find an "implied ratification" depends "on the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute." *National Muffler Dealers Assn. v. United States*, 440 U.S. 472, 477 (1979). There is no ratification absent clear evidence that Congress had actual knowledge of the challenged regulation at the time of reenactment. *Girouard v. United States*, 328 U.S. 61, 69 (1946).

The petitioners cannot meet this standard because at the time of the 1974 and 1985 Amendments, the issues regarding the salary basis test were not "generally recognized." *See* 57 Fed. Reg. at 37672, 37666. Further, the legislative subsections in which Congress has since mentioned the salary basis test are all aimed at *eliminating the effect of the test* in each legislative act at issue. (*See* Pet. Br., at 26.) Congress' effort to avoid any impact from the salary basis test in its recent legislation is certainly not evidence that Congress has ratified the test.

2. DOL's Limited Rulemaking In 1991-1992 Failed To Satisfy The Agency's Rulemaking Responsibilities

DOL's 1991-1992 rulemaking is insufficient to meet minimal standards under the APA. The Court should conclude that the salary basis test is invalid even after DOL issued a narrow amendment in September 1991.

a. The Salary Basis Test is Invalid Because DOL Continues to Refuse to Articulate Any Rationale for Applying the Test in the Public Sector

Amici recognize that administrative agencies such as DOL are generally entitled to deference in their rulemaking and administrative interpretations. *Chevron*, 467 U.S. at 844. However, the doctrine of judicial deference presupposes that the agency has observed its essential rulemaking duties. One essential duty is manifest: the agency must articulate some basis for its decision or action.

As explained by the Court: "[T]he agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-64. The agency must explain its interpretations so the courts can determine whether they are entitled to deference as "a reasonable accommodation of manifestly competing interests." *Id.* at 865; *see also Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 44 ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' "). Thus, it

is DOL, not those affected by DOL's action, that must justify its regulations.[9]

In the absence of any explanation, courts may not attempt to supply their own "reasoned basis for the agency's action. . . . " *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.[10] Rather, the validity of an agency's action must be determined on the administrative record made. *Camp v. Pitts*, 411 U.S. 138, 143 (1973).[11]

The record here shows that prior to its 1991 and 1992 salary test amendments, DOL failed to articulate any rationale for applying the salary basis test in the public sector. In 1992, DOL explained why it was eliminating the partial day docking provision of the salary basis test, but *expressly* declined to articulate any rationale for leaving the remaining portions of the test in place. When asked to consider the remaining elements of the salary basis test, DOL avoided, delayed, and equivocated. ("Only partial-day deductions from pay when leave was not used or exhausted and furlough-required deductions were addressed by the interim final rule. All other aspects of

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[9] *See also Cincinnati Bell Telephone Co. v. F.C.C.*, 69 F.3d 752, 758 (6th Cir. 1995).

[10] *See also, American Textile Mfrs., Inc. v. Donovan*, 452 U.S. 490, 539 n.73 (1981). ("[T]he courts will not be expected to scrutinize the record to uncover and formulate a rationale explaining an action, when the agency in the first instance has failed to articulate such rationale.").

[11] DOL's failure to explain how or why the salary basis test furthers some purpose of the FLSA when applied to public sector employment has caused many to posit their own explanations. The petitioners here believe the salary basis test is an "objective barometer of exempt status." (Pet. Br., at 32.) Petitioners' assertions miss the central point: it is the *agency's* obligation to articulate the rationale for its rules, and courts may not fill the gap. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43.

the salary test were left unchanged for the public sector. . . . " 57 Fed. Reg. at 37671; "Section 541.118(a)(5) [governing unpaid disciplinary suspensions] was not open for comment during the present rulemaking" 57 Fed. Reg. at 37674; "The Department expects to address [the issue of compensatory time off] as appropriate in proposed revisions of Part 541 at a later date" 57 Fed. Reg. at 37673; "[C]omments [arguing differences between public and private employment] do not address the 'salary basis' subject matter of the current rulemaking and will have to be dealt with at a later date when revisions to Part 541.2 are considered and proposed for public comment" 57 Fed. Reg. at 37673.)

Finally, DOL abdicated its responsibility by seeking to reverse its regulatory burden, arguing that *state and local governments had not proven the remainder of the test should be eliminated*. DOL's faulty understanding of its regulatory burdens is apparent from its commentary. "Sufficient justification has not been shown in the comments to warrant eliminating altogether the 'salary basis' requirements or making it inapplicable to public sector employees. . . . " 57 Fed. Reg. at 37673.

If the Court's jurisprudence in this area stands for anything, it is that administrative regulations do not attain validity solely by virtue of their existence. Agencies have a duty to supply a rationale for their rules. *Chevron*, 467 U.S. at 865. In this case, DOL has failed that duty. Under the Court's established APA authority, the lack of any stated rationale for DOL's course of conduct constitutes a per se violation of the APA.

b. The Salary Basis Test Is Invalid As Applied In The Public Sector Because DOL Refused To Consider Important Aspects Regarding Application Of The Test To State And Local Government

In addition to violating its duty to explain why the salary basis test is appropriately applied in the public sector, DOL violated a second responsibility: to evaluate all important aspects of the salary basis test when applied to state and local government. As the Court has explained, agencies violate the APA when they fail to consider an important aspect of the problem. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. at 44.

Here, as the foregoing section illustrates, the best that can be said of DOL's performance is that it finally addressed the salary basis test's prohibition on partial day docking. In its 1992 rulemaking, DOL declined to address any of the remaining salary basis test requirements. DOL refused to clarify the application of those subsections of the test that remained after its 1992 rulemaking. The agency declined to address the effect of compensatory time off practices that are prevalent in the public sector. DOL refused to consider whether the differences in public and private sector employment required additional changes to the salary basis test. And, the agency did not consider its prohibition on disciplinary suspensions, pronouncing that the issue "was not open for comment." 57 Fed. Reg. at 37674.

Nearly every circuit court of appeals has grappled with application of the salary basis test in the public sector, and with DOL's prohibition on disciplinary suspensions in particular. Clearly, important questions regarding the salary basis test remain unanswered after DOL's 1992 rulemaking, including whether the salary basis test should apply in the public sector *at all*. DOL's

failure, indeed refusal, to consider these problems constitutes a second, independent basis to conclude that the salary basis test as applied to state and local government violates the APA.

c. The Salary Basis Test Is Invalid Because It Is Irrational As Applied In The Public Sector

The salary basis test not only lacks a stated rationale, but is facially and operationally irrational when applied to public sector employment.

After its 1992 rulemaking, DOL continues to require that exempt employees be paid "on a salary basis" – *i.e.*, a predetermined amount of weekly pay regardless of their daily attendance. Yet, in section 541.5d, DOL expressly allows the possibility of hourly deductions in pay for partial day absences. It is illogical to require payment of a predetermined "salary," yet allow hourly deductions. In effect, the "salary" required by DOL in the public sector is the functional equivalent of hourly pay.

In addition to this facial inconsistency, application of the salary basis test operates irrationally. One of the most troubling aspects of the test is the subsection upon which the petitioners premise liability in this case – DOL's prohibition on disciplinary suspensions. *See* 29 C.F.R. § 541.118(a)(5). Under the test, the white collar exemption is not lost if an employee who commits a major safety violation is suspended for less than a week. Smoking in an explosives plant or coal mine is an example of a major violation. *Id.* For misconduct other than major safety violations, an unpaid disciplinary suspension of less than a workweek eliminates a white collar employee's exempt status.

This dichotomy is nonsensical. It means that to maintain the exemption, an employer may impose a short-term suspension for a major infraction, but must impose a longer term suspension for a minor infraction.

DOL's restriction on disciplinary suspensions is particularly senseless when applied in the public sector. When DOL eliminated its prohibition on partial day docking, the agency based its decision on principles of public accountability – that most government agencies appropriately require all employees to account for their time, regardless of rank or status. *Yet, the same accountability principles underlie public sector disciplinary systems with even greater force*. It simply makes no sense to suggest that local governments' interest in accurate timekeeping exceeds its interest in disciplining improper conduct.[12] As this Court has recognized, employee discipline is *fundamental* to the integrity of government. *See Connick v. Myers*, 461 U.S. 138, 150-51 (1983) (affirming government's legitimate purpose in "maintain[ing] proper discipline in the public service").

Moreover, the restriction on disciplinary suspensions creates irrational results when applied in the context of public sector discipline. Most public employees, even white collar employees, are subject to civil service rules and union contracts providing that dismissals may occur only for just cause. This contrasts sharply with private sector employees, who generally serve at the will of their employer. Where a just cause requirement exists, courts and arbitrators invariably require "progressive discipline" to ensure that employees have the opportunity to

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[12] In concrete terms, the present rule allows a public employer to deduct from pay if an employee goes to the dentist, but not if the employer is punishing the employee because the dentist appointment turned out to be a trip to the racetrack.

correct problems. Suspensions of less than a workweek are generally part of this progressive discipline process.

It is true, of course, that an employer has the option of giving a white collar employee suspensions in increments of full workweeks. However, where punishments are greater than those given to other employees represented by the same unions, the disparity forms a basis for challenging the discipline as unfair. Often, union agreements or local rules even specify the discipline for particular offenses. Conversely, if white collar employees are merely given a written reprimand, lower level employees assert they have been treated unfairly.

In short, the regulation mandates a senseless divergence in progressive disciplinary systems based solely on FLSA status. Nothing in the FLSA, its history, or in DOL's pronouncements since 1985 supports interfering with disciplinary systems in the public sector.

d. DOL's Delay in Conforming Its Regulations To Public Sector Employment In Itself Violates The APA

Unreasonable delay by an administrative agency in satisfying the mandates of its authorizing statute violates the APA. *See* 5 U.S.C. § 555(b) (agencies must conclude matters before them within a reasonable time); 5 U.S.C. § 706(1) (reviewing court may compel an agency action unlawfully withheld or unreasonably delayed). While this Court has not addressed these timeliness requirements, other courts have. *See Campesinos Unidos v. United States Dept. of Labor*, 803 F.2d 1063, 1068 n.2 (9th Cir. 1986). A delay of four or five years is unreasonable. *See MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 340-41 (D.C. Cir. 1980) (four-year delay of rulemaking unreasonable); *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) (five-year delay warranted

continuing jurisdiction over the agency's rulemaking timetable); *Oil, Chemical and Atomic Workers Intern. v. Zegeer*, 768 F.2d 1480 (D.C. Cir. 1985) (same).

The record here establishes that *since 1985*, DOL has avoided action in the face of mounting evidence that the salary test does not work in the public sector. DOL's *decade-long* delay in responding to its mandate to define and delimit the white collar exemption for public employees is indefensible.

e. The Salary Basis Test Does Not Survive The Heightened Judicial Scrutiny Invoked When Federal Regulations Impinge Upon Local Sovereign Interests

DOL has demonstrated a fundamental misunderstanding of its minimal burden to articulate *a rationale based on evidence* when applying regulations to state and local government. This Court has confirmed that the need for a proper evidentiary basis is especially acute where a federal agency intrudes upon an area traditionally entrusted to state governance, particularly where Congress has not indicated that it envisions such interference. *See Bowen v. American Hospital Ass'n*, 476 U.S. at 643.

> [T]he propriety of the exertion of [an agency's] authority must be tested by its relation to the purpose of the [statutory] grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear.

Id. at 645; *see also Florida v. United States*, 282 U.S. 194, 211-12 (1931).

Applying the salary basis test to state and local employment is an exertion of federal power "within what would otherwise be the domain of state power." *Bowen*, at

645. The salary basis test interferes with precisely the kinds of structural decisions appropriately left to local government: whether government workers can be suspended for improper behavior, and how a government calculates salaries and ensures the integrity of their payroll and personnel systems. The decisions regarding these procedures are meant to insure that public employees, no matter how high ranking, are compensated only for time worked and fairly disciplined. The people's faith in their government depends on these principles.

Under *Bowen*, the federal bureaucracy *cannot* impinge upon matters of fundamental local concern, such as the accountability of government workers to the public, without articulating a solid reason founded in statutory authority and the administrative record before the agency. Here, there is neither an evidentiary record, nor even a stated rationale, for applying the salary basis test to the public sector.

In the present case, the principles of *Bowen* are compelling. Public agencies throughout the country have been subjected to massive unfunded liabilities because of DOL's inaction. That liability, and the cost of defending lawsuits such as this one, are not borne by stockholders – they are borne by taxpayers. Just as critically, the costs are suffered by those who rely on the essential services provided by states, cities and counties – services such as police and fire protection, hospitals, parks, housing, education and street repair. If a federal agency establishes rules imposing liabilities that take away from these critical services, it is not too much to ask that it have and articulate a solid reason founded either in the clear language of a statute, or, at very least, the clear intent of Congress. *See California State Board of Optometry v. Federal Trade Comm'n*, 910 F.2d 976 (D.C. Cir. 1990).

B. APPLICATION OF THE SALARY BASIS TEST TO LOCAL AND STATE GOVERNMENTS ALSO VIOLATES THE TENTH AMENDMENT

Applying the salary basis test to local and state public employers under the circumstances discussed above also directly runs afoul of the Tenth Amendment.

1. *Garcia* And *Gregory* Bar Application Of The Salary Basis Test Absent A Plain Statement by Congress

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court invalidated the FLSA as applied to state and local government based on the Tenth Amendment. Nine years later, however, the Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Even after *Garcia*, however, application of the salary basis test to local governments is contrary to the Tenth Amendment.

In *Garcia*, the Supreme Court made clear that the states' primary protection from Congressional action that burdens their integrity is the states' representation in Congress. 469 U.S. at 551. Thus, the Court considers first whether the "built-in restraints that our system provides through state participation in federal governmental action" has operated to protect the states' interests. *Id.* at 556. If there have been "possible failings in the national political process," the Court will decide whether Congress has exceeded the limits imposed by the Tenth Amendment. *Id.* at 554.

Significantly, this protection of political participation is unavailable when the challenged action is not a statute but an administrative regulation. As one commentator has explained:

> [*Garcia*'s] process-oriented doctrine of constitutional law has no applicability, however, to the dealings of state legislatures and state agencies with federal agencies, where there can be no question of protection through political representation, other than the usually fruitless tactic of appealing to one's senator or congressman to intercede.

Fisher, *Federalism Contra Federal Reservism: Bank Holding Companies and State Bank Powers*, 33 U.S.F.L. Rev. 317, 369 (1989); *see also* Odom, *The Tenth Amendment After Garcia: Process-Based Procedural Protections*, 135 U.Pa.L.Rev. at 1675-76 (discussing proposal that federal intrusion into area of state concern should only be accomplished by Congress since agencies are too far removed from political process to safeguard states' interests).

The focus of the Court's discussion of the Tenth Amendment, in cases where the federal government has intruded upon matters traditionally left to state and local government, is whether *Congress* intended the intrusion. For example, in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Court reiterated the "plain statement" rule requiring that "if *Congress* intends to alter the usual balance between the States and the federal government *it* must make its intention to do so unmistakably clear in the language of the statute." *Id.* (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (emphasis added)). As the Court further observed in *Gregory*:

> Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain *Congress* intended such an exercise.

501 U.S. at 464; *see also California State Bd. of Optometry*, 910 F.2d at 981-82 (D.C. Cir. 1990).

It is clear, of course, that Congress intended the FLSA to apply to state and local public employers. However, there is no indication whatever in the legislative history that Congress was even aware of the arcane requirements of DOL's salary basis test, much less the very significant manner in which they would affect the management of local government. As DOL has noted, "Congress presumably was *unaware* that, because many public sector compensation systems preclude payment for hours not worked," these systems would fail the salary basis test. 57 Fed. Reg. at 37672 (emphasis added). Similarly, there is no indication Congress was even aware of the other effects the salary basis test has on local governments, such as the prohibition on progressive discipline of less than seven days.

For these reasons, the Court should hold the salary basis test cannot be applied to local and state public employers because Congress has not plainly stated its intention that the test apply.

2. DOL Has Failed To Meet The Minimum Procedural Requisites of *Garcia*

Even if this court were to apply the kind of deference suggested by *Garcia* to the administrative processes of federal agencies, in this case, the procedural safeguards required by *Garcia* plainly have failed. DOL provided local governments no opportunity to revise or eliminate the salary basis test when the FLSA was extended to them. No hearings were held and no views were solicited. Rather, through administrative inaction, a test that was premised upon the practices of *private employers* 40 years ago was simply extended to government employers, with

no consideration given to the unique structure and principles applicable in the public sector.

Equally important, when the salary basis test was modified in 1991, DOL expressly refused to consider (1) whether the salary basis test itself is a valid indicator of white collar status in the public sector; and (2) whether any of the remaining aspects of the test, including the disciplinary prohibition, are valid indicators of white collar status.

The extent to which the process failed state and local governments is illustrated by the federal government's treatment of *itself* on this issue. The United States office of Personnel Management has *made the salary test inapplicable to federal employees*. *See* supra, n.3. DOL has failed, however, to offer state and local government employers similar treatment.

Under these circumstances, it is clear that the process afforded state and local governments through DOL has not adequately protected "the internal order . . . of the State[s]." *Gregory* at 458, *quoting The Federalist No. 45*, pp. 292-293. As the Court recognized in *Gregory*, the "operation" of state government is a matter uniquely reserved to the states themselves. While *Garcia* and *Gregory* recognize that Congress may alter the operation of state government if Congress does so directly and intentionally, those cases equally recognize that the federal government must exercise great caution when exerting its power in this area.

Plainly, DOL's conduct with respect to the salary basis test manifests no recognition of this Court's admonition that "the States retain substantial sovereign powers under our constitutional scheme, powers which Congress does not readily interfere." If *Congress* may not readily interfere with the operation of state government, a federal administrative agency must exercise at least the same

degree of circumspection. And just as plainly, DOL has not done so here.

VI. CONCLUSION

The Court should hold that the salary basis test in its entirety cannot validly be applied to state and local governments.

Respectfully submitted,

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**Attorney of Record*

DATED: October 11, 1996

APPENDIX A

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL T. MCGUIRE, JAMES P. KLUM, GRANT M. COFFEY, PATRICK A. DOONEY, JERRY L. IVIE, et al.,	) No. 95-35391)) D.C. No.) CV-94-00360-REJ
Plaintiffs-Appellees,	) ORDER
v.	)
CITY OF PORTLAND, OREGON,	) (Filed Aug. 30, 1996)
Defendant-Appellant.	)

Before: GOODWIN, SKOPIL and SCHROEDER, Circuit Judges.

The motion by amici curiae International Personnel Management association, et al., for leave to file an amicus curiae brief in support of the petition for rehearing and suggestion for rehearing en banc is GRANTED.

Consideration of the petition for rehearing and suggestion for rehearing en banc is deferred pending the Supreme Court's decision in *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995).

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WAYNE BLOCK; ANICK CHARRON; EUGENE GREENE, et al., Plaintiffs-Appellees, v. LOS ANGELES DEPARTMENT OF WATER AND POWER, Defendant-Appellant.	No. 94-56135 D.C. No. CV-91-05461-JGD
WAYNE BLOCK; ANICK CHARRON; EUGENE GREENE, ROBERT B. HYDE; DAVID G. LEATHERMAN; SHU TAN, Plaintiffs-Appellees, v. CITY OF LOS ANGELES, Defendant-Appellant.	No. 94-56421 D.C. No. CV-91-05461-JGD
WAYNE BLOCK; ANICK CHARRON; EUGENE GREENE, Plaintiffs-Appellees, v. LOS ANGELES DEPARTMENT OF WATER AND POWER; CITY OF LOS ANGELES, Defendants-appellants.	No. 94-55345 D.C. No. CV-91-05461-JGD ORDER (Filed Oct. 2, 1996)

Before: BROWNING, WALLACE and FARRIS, Circuit Judges

Submission is vacated pending the disposition of *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995), currently before the Supreme Court.

APPENDIX B

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

[SEAL]

THE DIRECTOR

APR 14 1994

Honorable Robert Reich
Secretary of Labor
Washington, D.C. 20210

Dear Mr. Secretary:

It has recently come to my attention that the section 541 regulations of the Fair Labor Standards Act (FLSA), which govern the payment of overtime, are currently the subject of numerous court cases involving employers and employees in the public sector. There is some prospect that similar court cases will continue to arise until the present regulations are reworked to take into account today's highly-educated, service-oriented workforce. The court cases suggest that, due to the outdated nature of the section 541 regulations, some highly compensated public sector employees with responsibilities that would normally exempt them from coverage may be eligible for overtime, a situation that could cost State and local governments hundreds of millions of dollars. I understand that your staff is fully aware of this issue.

I would appreciate it if the Department of Labor would undertake a comprehensive review and revision of the FLSA overtime regulations, as they apply to the public sector, to make them workable in today's economy. I also would urge you to work with the Office of Personnel

Management (OPM) to ensure consistency, to the degree possible, between your Department's regulations and OPM's regulations as they apply to public sector employees.

My staff would be pleased to work with your staff in framing the scope of this review. I think such an undertaking would be an excellent good government exercise. It would dovetail with your effort to improve and streamline the Department's enforcement of Federal labor laws and the Department's quest to ready the American worker and workplace for the 21st Century.

Thank you.

Sincerely,

Original Signed By
Leon E. Panetta
Leon E. Panetta
Director

APPENDIX C

ZWERDLING, PAUL, LEIBIG, KAHN, THOMPSON & WOLLY, P.C.

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[Names Omitted In Printing]

October 9, 1996

Darren W. Lee, Esquire
Office of the City Attorney
Fifth Floor
1390 Market Street
San Francisco, California 94102

Re: *Auer v. Robbins* Respondent Supporting Amici

Dear Mr. Lee:

This letter is in response to your request for consent of the Petitioners in the Supreme Court case *Auer v. Robbins* (No. 95-897) to file an *amicus curiae* brief.

Petitioners consent to your filing an *amicus* brief on behalf of the League of California Cities, et al. with the sole caveat that the brief address only the issues concerning which the Court has granted *certiorari*. Those issues are:

1. *DOL's Public Sector Salary Basis Rules.* Do the "salary basis rules" set out in 29 C.F.R. Section 541.5d incorporating 29 C.F.R. 541.118(a)(5) apply to public employees?

2. *The "Subject To" Rule.* Do those rules require the loss of exempt status when a clear, intentional, unreformed disciplinary code "subjects" employees to non-safety suspensions of less than a full work period or only in cases of actual suspensions?

3. *The "Window of Corrections."* Does the "window of correction" in 29 C.F.R. Section 541.118(a)(6) allow an employer to treat a group of employees as exempt simply by revoking a small portion of an offending disciplinary rule, which it had actually applied after the initiation of litigation, to a member of the employee group, without revoking the more general "subject to discipline" rule and without actually restoring the lost compensation to the employee involved?

Petitioners do not consent, nor would it be appropriate under the applicable rules, to your filing a brief which raises other FLSA or 10th or 11th Amendment federalism issues in which your clients may have an interest, but concerning which the Court has not expressly granted *certiorari* in this case.

With that sole caveat, you have Petitioners' consent to file an *amicus* brief.

Sincerely,

/s/ Michael T. Leibig /G
Michael T. Leibig
Petitioners' Counsel
Auer v. Robbins

MTL/blf